

United States Supreme Court, U. S.

FILED

OCT 22 1923

WM. R. STANSBURY
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IN THE
Supreme Court of the United States

October Term, 1923

No. 110

SOUTHERN POWER COMPANY,

Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, and CITY OF HIGH
POINT,

Respondents.

RESPONDENT'S REPLY TO PETITIONER'S MOTION TO ENJOIN THE NORTH CAROLINA PUBLIC SERVICE COMPANY FROM FURNISHING HYDRO-ELECTRIC CURRENT AND POWER TO THE CITIZENS OF GREENSBORO AND HIGH POINT AND VICINITY, AS HERTOFORE DONE.

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FORE DONE.**

Comes now the North Carolina Public Service Company, City of Greensboro, and City of High Point, respondents, by their attorneys, and for answer to petitioner's motion to preserve what it is pleased to call the status quo, and replying specifically to the several allegations set forth in the motion, say:

I.

That it is true as alleged in paragraph one that the petitioner and respondent North Carolina Public Service Company are both public service corporations, but it is denied that the North Carolina Public Service Company is engaged in the distribution and sale of electric current in the State of North Carolina other than at Greensboro, High Point and Salisbury, and to a limited extent in the vicinity of these several places.

That it is denied that the respondent company instituted this suit to compel the petitioner to furnish current to it for re-sale, as it had theretofore been doing under special contract. The purpose of said suit is as set forth in the pleadings, and was, and is, to compel the petitioner to continue to furnish current and power to the respondent company for re-sale to the consuming public in Greensboro, High Point, and vicinity, without discrimination in rates and upon the same terms and conditions that it was and is selling other like customers.

II.

That the allegations contained in paragraph two are admitted.

III.

That the allegations contained in paragraph three are admitted, except the facts with relation to the order of the Circuit Court of Appeals continuing the service, are not stated. The facts with relation to same are as follows:

The District Court entered its decree on the 29th day of June, A. D. 1921, continuing the ser-

vice for six months. The six months period thus allowed would expire December 29th, 1921. The petitioner declined to consent to an order by the Circuit Court of Appeals continuing this service, whereupon, the respondents petitioned the court for an order continuing same, which was accordingly entered by that court on December 28th, 1921, and is as follows (Rec. P. 331):

“Whereas, the decree of the court below contains the following: ‘further ordered, adjudged, and decreed that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants, and those in the vicinities of said cities, as they are now being served by said complainant as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company,’ and it appearing to the court that said six months will expire on December 29th, 1921, it is now here ordered that said period of six months be, and the same is hereby extended with the same terms and provisions until the further order of this court.

MARTIN A. KNAPP,
Senior Circuit Judge,
December 28th, 1921.”

The same day, to-wit, Dec. 28th, 1921, a certified copy of said order was transmitted to the U. S. District Court, at Greensboro, North Carolina.

IV.

That as to the allegations contained in paragraph four, it is admitted that the respondent

Public Service Company has in a few instances extended its lines within the City of Greensboro and High Point and the vicinities of said cities, to accommodate the normal and usual growth and demand of cities of this size in North Carolina, but it denies that such increase in electricity taken from petitioner's system has been other than was contemplated by the court in entering its original decree and by the Circuit Court of Appeals in continuing this service, and is no greater than is necessary to supply the daily needs of the inhabitants.

That the Circuit Court of Appeals in express terms directed that the petitioner should continue to furnish current for the use and benefit of the cities of Greensboro and High Piont and their citizens and inhabitants and those in the vicinities of said cities as they are now being served, and that they should so continue until the further order of the court. The opinion and final order of the court was filed May 10th, 1922, expressly providing that the petitioner had no grounds for its refusal to furnish current to the Public Service Company, and concludes its opinion with the statement that

“the rates and terms upon which current is furnished to the North Carolina Public Service Company and other corporations doing like business are of course subject to the rules and regulations of the North Carolina Corporation Commission.”

No suggestion or intimation was made either in brief or argument before the Circuit Court of Appeals that the respondent Public Service Company should not be allowed to take any additional current for the use and benefit of the cities in their normal growth. As the petitioner

has no lines in either of said cities, and is not engaged in the retail business, there was and is no other source of supply open to such citizens. During a period of more than ten years past, the respondent Public Service Company has gradually increased the amount of current taken and distributed, and such course of dealing was expressly recognized in the decree when it was stated that they should continue to furnish current "as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to the North Carolina Public Service Company."

V.

That the allegations contained in paragraph five are substantially correct.

VI.

That the allegations contained in paragraph six are inaccurate and untrue. That the facts with relation to the matters therein referred to are as follows:

The cities of Greensboro and High Point are both situate in Guilford County, about sixteen miles apart, and are connected by a hard surface highway; that on this highway, about five miles from High Point, is situate the little village of Jamestown, unincorporated, and without any means of lighting the homes of its citizens. That the respondent Public Service Company, at the urgent request of these citizens, has extended its line in order to afford lighting for their homes; that there are only ninety-three (93) customers on this line and no shoe factory, nor any motors of any description are connected

with same; that the quantity of electric current necessary to supply the needs of these additional consumers is the approximate output of a 4 Kilowatt generator operating ten hours per day. This line and service was installed at a loss to the respondent Public Service Company, and solely as a matter of convenience and accommodation to these people to light their homes, a public High School building, and a County Tubercular Hospital. That the Armour Fertilizer Company, Swift & Company, American Agricultural Chemical Company located a number of years ago small mixing and distributing plants at Greensboro; that with the knowledge, consent and approval of the petitioner, who had no lines connecting with these plants, the respondent Public Service Company built transmission lines to same and began serving them current necessary for their business. The amount of current has from time to time increased with the normal growth of the business, and the average increase in consumption since the entering of the original order in this case has been no greater than during like previous periods; that the Carolina Steel & Iron Company is a small concern and its increased demand can be taken care of with a seventeen Horse Power generator operating ten hours a day for 312 days a year; that it is untrue and denied that the respondent Public Service Company has entered upon the property of petitioner adjacent to its sub-station at Greensboro and has undertaken to install upon said property electrical transformers of any description.

VII.

As to the allegations contained in paragraph seven, respondent Public Service Company denies,

that it is taking any power from the petitioner unlawfully, or doing anything in the premises contrary to the express decree of the United States Circuit Court of Appeals, and that unless and until this decree is abrogated, the petitioner has no cause of complaint.

VIII.

That as to the allegations contained in paragraph eight, the same are untrue and denied; that the petitioner's equipment and current supply both at High Point and Greensboro are ample and sufficient to take care of the relative small demands made upon it by the respondents; that the petitioner in 1909 built in Greensboro a brick sub-station and installed therein three 1,000 K. V. A. transformers, a total capacity of 3,000 K. V. A.; that this respondent was then and has ever since been the only customer which the petitioner serves through these transformers; that on June 1st, 1923, the maximum load on these transformers was 2,400 kilowatts; that the transformers of the type installed at petitioner's sub-station can operate efficiently and economically under a 25% overload.

That the petitioner, in 1909, constructed a sub-station in High Point with three transformers, each having a capacity of 1,500 K. V. A., or a total capacity of 4,500 K. V. A. At this time, and for a number of years thereafter, the respondent Public Service Company was the only customer which the petitioner served from this sub-station; that on June 1st, 1923, the maximum load of the respondent was 2,650 Kilowatts; that several years after the respondent began taking current through this sub-station, the petitioner connected up two cotton mills

with same, located outside of the City of High Point, and has been since serving these two said mills through this sub-station; that the respondents are advised that one of the cotton mills uses approximately 520 Kilowatts, and the other 840 Kilowatts; that one of the mills has within the last few months added 5,000 additional spindles, and this additional load has been imposed upon this sub-station.

That the allegation that the respondent Public Service Company is overtaxing the transformers in either Greensboro or High Point is untrue in fact and whatever excessive load may be added to the High Point transformers is due to the direct action of the petitioner in increasing its own load upon same.

IX.

The allegations contained in paragraph nine are admitted.

For further answer, the respondents say:

I.

That petitioner's transformer stations at Greensboro and High Point are not overtaxed, and the amount of current taken constitutes no danger to the petitioner's transmission system, but if it did, the remedy is both simple and inexpensive. These transformer stations are constructed in units, varying in size. They may be and are enlarged by adding additional units to the sections already placed.

II.

The respondents aver that the assertion by the petitioner of its inability to continue to serve

current at Greensboro and High Point, and the great damage that is likely to result to petitioner's property by the insignificant increase in the consumption is unfounded in fact and unsupported by evidence. The petitioner, in 1920, filed a petition with the City of Greensboro, asking the privilege to render the same character of service which it is now complaining of the respondent Public Service Company's giving. In Section 7 of this petition (Rec. p. 237), it makes the following declaration:

"Your petitioner recognizes its obligation to furnish your city and citizens whatever electricity shall be needed for municipal and domestic consumption in preference to its customers, who only need, or use, the same for industrial purposes, provided your Honorable Board will grant it a franchise to enable it to discharge this public duty, or obligation; as it claims, and hereby asserts, the right to render such service directly to the city and citizens of Greensboro, to whom alone it is responsible, and not through the medium of the North Carolina Public Service Company, to whom it owes no public duty whatever. It, therefore, hereby applies to this Honorable Board for a franchise to construct, maintain and operate in said city, and along and over its streets, and other public places therein, the necessary transmission lines, poles, appliances, etc., to enable it to furnish and supply the city and its citizens with electricity required by them for municipal, domestic and other purposes, hereby assuring your Honorable Board that should said franchise be granted within the time hereinafter stated, it will be ready, able and willing to supply your city, and its citizens, with the above mentioned service, on and after January 1, 1921, for such time and upon such terms as may be agreed upon."

In addition to petitioner's ability and readiness to render this service at that time, it has greatly supplemented its capacity for public service in this regard by developing large additional hydro-electric power units and installing many more instrumentalities, as evidenced by its declaration in its petition filed with the North Carolina Corporation Commission on the 13th day of October, 1923, asking for additional increase in rates over a former increase previously allowed by the Commission, which granted an extra charge of 10% for current sold other public utility companies. The declaration is as follows:

"That following said order of July 8th, 1921, petitioner took immediate steps to enlarge its facilities for the generation and distribution of electric power, and in this connection has caused to be constructed at great cost a large hydro-electric plant at Mt. Island in the counties of Gaston and Mecklenburg, State of North Carolina, having a capacity of about 80,000 Horse Power, and a large hydro-electric plant at Great Falls, South Carolina, known as the Dearborn Station, and having a capacity of about 60,000 Horse Power, and has erected two large steam plants, one at Mt. Holly, in the County of Gaston, and the other near University Station, in the County of Orange, State of North Carolina, and has built numerous transmission and distribution lines, sub-stations and other apparatus and appliances for the transmission and distribution of electric power to the consuming public of this state."

The respondents are advised and believe that the two steam plants above referred to at Mt. Holly and University Station have a combined rated capacity of about 60,000 Horse Power,

making a total of increased constructed Horse Power since the original decree was entered in 1921 of about 200,000 Horse Power. That the above newly constructed plants operated at capacity of 24 hours a day, 312 days a year, have an annual output of approximately 1,123,200,000 Kilowatt hours. This, added to the 300,000 Horse Power capacity of the petitioner theretofore in use, as ascertained by the Circuit Court of Appeals, makes a total capacity of 500,000 Horse Power, thus comprising a total capacity under the control of the petitioner of approximately 2,808,000,000 Kilowatt hours, plants operated at capacity of 24 hours a day, 312 days a year.

That the petitioner, having thus greatly enlarged its capacity and instrumentalities for service after the rendition of the decree by the United States District Court herein, took on many new customers, and transmits over its lines through High Point and Greensboro to Reidsville and other points, large quantities of additional current, which is sold to new customers.

III.

That since the original decree was entered in the U. S. District Court, the petitioner has greatly enlarged its capacity for service to the consuming public in North Carolina, as well as enlarging and amplifying its mechanical instrumentalities for better service, and particularly with relation to Greensboro and High Point. That among other things, the petitioner has built a large transmission line from its extensive hydro-electric development at Lookout Shoals, N. C., to Winston Salem and to Greensboro, and from Lookout Shoals to Salisbury, thus connect-

ing with its main transmission line to the south of High Point and to the north of Greensboro.

IV.

The respondents are advised that the Southern Power Company furnishes transformers for all of its sub-stations both in North Carolina and South Carolina and carries in stock a number of transformers of different capacity, and if it had the disposition, could, with little expense and inconvenience, relieve any possible danger from the alleged excessive load either in Greensboro or High Point. That in this connection your respondents are advised, believe and aver that the petitioner, Southern Power Company, within the last twelve months has connected its transmission line with the Caldwell Power Company, an independent vendor of current in the cities of Morganton and Lenoir, North Carolina, and has installed at its own expense in sub-stations at each of these places transformers similar in character to those now in use at Greensboro and High Point, and is distributing its current to the said Caldwell Power Company through these transformers for re-sale in the two said cities. Respondents file herewith the affidavit of Edward W. Myers, to that effect marked "Exhibit A."

V.

That your respondents deny that they have changed the status quo since the rendition of the Circuit Court of Appeals in this case, and that this petition is unfounded, for that the status quo is not as defined by the decree of the District Court, but as stated in the opinion of

the Circuit Court of Appeals, and particularly, in the following paragraph of that opinion:

"In this instance, the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State. It cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers and arbitrarily discriminate among them."

VI.

That the petitioner, Southern Power Company, is selling current to many other independent vendors of current in North and South Carolina. The two largest cities in North Carolina, Charlotte and Winston Salem, are being thus served, and the petitioner is maintaining sufficient transformer stations in each of these cities, and in all other cities furnished through independent vendors to supply the increasing demands for current made necessary by their growth and development. That the effort to discontinue such service to these respondents is an additional discrimination which the petitioner seeks to impose in violation of its duty as declared by the U. S. Circuit Court of Appeals.

VII.

That the total consumption of current by the respondent company from June 1st, 1922, to June 1st, 1923, in both Greensboro and High Point as stated in petitioner's motion is less than 1% of the petitioner's total capacity output.

WHEREFORE, your respondents pray that this honorable court will dismiss the motion and affirm the decree of the United States Circuit Court of Appeals, and require the petitioner to continue furnishing electric service to the respondents as it has heretofore been ordered to do, and in such quantities as is reasonably necessary to take care of the normal demands of your respondent Public Service Company to supply the needs of the cities of Greensboro and High Point, and their vicinities.

This the 19th day of October, 1923.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO,
CITY OF HIGH POINT,

By AUBREY L. BROOKS,
JOHN W. DAVIS,
KING, SAPP & KING,
Attorneys for Respondent
North Carolina Public
Service Company.

C. A. HINES,
Attorney for Respondent
City of Greensboro.

DRED PEACOCK,
Attorney for Respondent
City of High Point.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

Before me, the undersigned Notary Public in and for the foregoing county and state, personally came and appeared L. H. HOLE, JR., who being duly sworn, says that he is Secretary & Treasurer of the North Carolina Public Service Company, the respondent herein; that he has read the foregoing reply to the petition filed in this cause and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to such matters he believes it to be true.

L. H. Hole, Jr.

Sworn to and subscribed
 before me this *19th*
 day of October, 1923.

WM H. BRUDEN

NOTARY PUBLIC, BRONX COUNTY No. 32
 CERTIFICATE FILED IN NEW YORK COUNTY NO. 327

Exhibit A.

NORTH CAROLINA
GUILFORD COUNTY.

E. W. MYERS, first being duly sworn, says: That he is a Civil Engineer, and a member of the firm of Ludlow, Engineers, of Winston-Salem, North Carolina; that he is familiar with a local public utility company situate at Lenoir, North Carolina, now known as the Caldwell Power Company; that the former owners of this property about eighteen months ago were arranging to dispose of same to the present owners, and affiant made a physical valuation of said property; that Mr. A. M. Kisler of Morganton is the principal owner and controller of the present Caldwell Power Company, which took over this property, and now operates in and around Lenoir and Morganton, North Carolina; that the former Company purchased a portion of its power from a small, independent hydro-electric development near Lenoir, and supplemented this with a steam plant in Lenoir; that after the purchase of the present Power Company, now known as the Caldwell Power Company, Mr. Kisler and his associates within the last twelve months connected up these properties with the Southern Power Company's transmission lines, and it has since purchased current from that Company; that the Caldwell Power Company re-sells current for lighting and local purposes in Morganton and Lenoir and to industrial industries situated in and around these two places.

This 8th day of October, 1923.

EDW. W. MYERS.

Sworn to and subscribed before me,
this 8th day of October, 1923.

FLORENCE E. MONROE
Notary Public.

My Commission expires March 17th, 1925.
(Seal)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. **554**

SOUTHERN POWER COMPANY, PETITIONER

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, AND CITY OF HIGH POINT, RESPONDENTS.

MOTION OF PETITIONER THAT, PENDING THE FINAL DETERMINATION OF THIS CAUSE, THE NORTH CAROLINA PUBLIC SERVICE COMPANY BE RESTRAINED FROM INCREASING THE AMOUNTS OF ELECTRICITY TAKEN BY IT FROM PETITIONER'S HYDRO-ELECTRIC SYSTEM AT GREENSBORO AND HIGH POINT, NORTH CAROLINA, IN EXCESS OF THE AMOUNTS FIXED BY PROVISION OF THE DECREE OF THE DISTRICT COURT, ENTERED JUNE 29TH, 1921, WHICH PROVISION WAS EXTENDED BY ORDER OF THE CIRCUIT COURT OF APPEALS.

Comes now the Southern Power Company, petitioner, by its attorneys, and moves this honorable court that it will by proper process restrain the North Carolina Public Service Company, pending the final determination of this cause by this honorable court,

from increasing the amounts of electricity to be taken by said North Carolina Public Service Company from petitioner's hydro-electric system at Greensboro and High Point, North Carolina, for the purposes of resale and distribution, in excess of the amounts which said North Carolina Public Service Company was taking at said points on and prior to the entry of the decree of the District Court herein on the twenty-ninth day of June, A. D., 1921.

The object of this motion is that pending the final determination of this cause, the *status quo* of the parties may be preserved, as first fixed by the terms of the decree of the District Court (Page 322 of the Record), and as subsequently further provided by the order of the Circuit Court of Appeals while this cause was pending before that honorable court (Page 331 of the Record).

Petitioner respectfully shows the court, in support of this motion, the following facts, to-wit:

I.

Both petitioner, the Southern Power Company, and the North Carolina Public Service Company are public service corporations engaged in the distribution and sale of electric current and power to the consuming public in the State of North Carolina.

This suit was instituted by the North Carolina Public Service Company and its co-respondents, the Cities of Greensboro, North Carolina, and High Point, North Carolina, to compel petitioner to continue furnishing to the North Carolina Public Service Company electricity for resale and distribution by said

North Carolina Public Service Company to its customers in the Cities of Greensboro and High Point, as petitioner had been heretofore doing under special contracts which had expired by limitation of time prior to the institution of this suit.

II.

The District Court, after final hearing, entered its decree which in part was as follows:

"That the complainants have no legal right to require and compel the defendant (petitioner) to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said Cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company, and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and distribution of electricity to said North Carolina Public Service Company for such uses and purposes." (Page 321 of the Record).

Upon the appeal of the North Carolina Public Service Company to the United States Circuit Court of Appeals for the Fourth Circuit, the decree of the District Court was modified (Page 344 of the Record) and thereafter, the mandate of the Circuit Court of Appeals in the meantime having been stayed, the Record was brought into this court in response to a writ of certiorari and the cause is now pending undetermined in this court.

III.

The United States District Court, notwithstanding its decree that the North Carolina Public Service Company was not entitled to have petitioner enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for resale and distribution in the Cities of Greensboro and High Point, incorporated in the decree the following:

"The Court is, however, desirous of incorporating in this decree such reasonable terms as will afford the complainants, Cities of Greensboro and High Point, an opportunity to make such arrangements as they may be advised to make in order that said cities of Greensboro and High Point and their citizens may not be deprived of the use and benefit of electric current and power for the uses and purposes heretofore and now enjoyed by them, and also to afford the complainant, North Carolina Public Service Company, an opportunity to make such arrangements as it may be advised to make in order to continue the persecution of its business,"

and provided.

"That the Court in the exercise of its discretion and in order, as hereinbefore recited, to afford the cities of Greensboro and High Point an opportunity to make such arrangements as they may be advised to make whereby said cities may not be deprived of the use and enjoyment of electric current and power for the uses and purposes aforesaid heretofore and now enjoyed by them,

as well as to afford the North Carolina Public Service Company an opportunity to make such arrangements as it may be advised to make to enable it to continue to prosecute its business, further orders, adjudges and decrees that for and during the period of six months from the date of this decree the defendant shall continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants and those in the vicinities of said cities as they are now being served by said complainant, as the defendant has heretofore sold and delivered such electricity to said North Carolina Public Service Company, upon condition, however, that the complainant, North Carolina Public Service Company, duly and promptly make the payment and make and execute to the defendant the bond hereinbefore provided for on account of the electricity heretofore and since January 1, 1921, sold and delivered to it by the defendant."

While the cause was pending before the Circuit Court of Appeals, it entered its order that the six months period during which petitioner should continue to sell and deliver electricity to the North Carolina Public Service Company for resale and distribution should be continued until the further order of the court, subject to the terms and provisions set forth in the decree of the District Court (Page 331 of the Record). No further order providing for the continued

sale and delivery of electricity by petitioner to the North Carolina Public Service Company, pending the final determination in this cause, has been made, either by the District Court or by the Circuit Court of Appeals.

IV.

Since the decree of the District Court, which was entered on the twenty-ninth day of June, 1921, the North Carolina Public Service Company has extended its distribution lines for the sale of electricity in the Cities of Greensboro and High Point and in the territories adjacent to said cities, and has very substantially increased the amounts of electricity taken from petitioner's system, both at Greensboro and at High Point, beyond the amounts which said North Carolina Public Service Company was taking at the time of said decree or had ever taken theretofore.

V.

That as hereinbefore stated, the decree of the District Court was entered on the twenty-ninth day of June, A. D., 1921. For the twelve months period between July 1, 1920, and July 1, 1921, the amount of electricity taken by the North Carolina Public Service Company from petitioner at High Point, North Carolina, was 6,538,600 kilowatt hours and this was the greatest amount of electricity which had ever been taken by said North Carolina Public Service Company during any like period of twelve months; that following the entry of said decree, the North Carolina Public Service Company took from petitioner's system at High Point, North Carolina, for

the twelve months period between July 1, 1921, and July 1, 1922, 9,060,200 kilowatt hours, and for the eleven months period between July 1, 1922, and June 1, 1923, the amount taken at said point was 10,124,624 kilowatt hours. Petitioner hereto attaches a statement showing the amounts of electricity taken from its system at High Point, North Carolina, by the North Carolina Public Service Company, month by month during the respective periods just referred to, which statement is marked as "Exhibit 1" and asked to be taken as a part of this motion.

During the twelve months period from July 1, 1920, to July 1, 1921, the North Carolina Public Service Company took from petitioner's system at Greensboro, North Carolina, 8,754,200 kilowatt hours of electricity. During the twelve months period from July 1, 1921, to July 1, 1922, the amount taken by the North Carolina Public Service Company, at Greensboro was 10,069,600 kilowatt hours, and during the eleven months period from July 1, 1922, to June 1, 1923, the amount taken at said point was 11,475,700 kilowatt hours. Petitioner attaches hereto a statement showing the amounts of electricity taken by the North Carolina Public Service Company at Greensboro, North Carolina, month by month, during the periods referred to, which statement is marked "Exhibit 2," and asked to be taken as a part of this petition.

VI.

The North Carolina Public Service Company now has under construction a line extending from High

Point, North Carolina, to Jamestown, North Carolina, a distance of some five or six miles from High Point and, as petitioner is informed and believes, the North Carolina Public Service Company proposes to connect this Jamestown Line with its High Point system and to take electricity from petitioner at High Point for resale and distribution in Jamestown and vicinity. That as petitioner is further informed and believes, it is the purpose of the North Carolina Public Service Company to take on between one hundred twenty-five (125) and one hundred fifty (150) new customers on said Jamestown Line, including a shoe factory. That as petitioner is informed and believes, the North Carolina Public Service Company has not only extended its distribution lines within the City of Greensboro but has also extended the same into the adjacent territory beyond said city and since about January 1, 1923, has taken on some eighty-five (85) new customers outside of said City of Greensboro. That said North Carolina Public Service Company has very substantially increased the amount of electricity which it is reselling at Greensboro to the following group of industrial enterprises, to-wit: "Armon Fertilizer Company," "Swift and Company," "American Agricultural-Chemical Company," and "Carolina Steel and Iron Company," and in order to make delivery of said increased amounts of electricity to said industrial enterprises, as well, as petitioner is informed and believes, to further increase the resale of electricity to said enterprises, said North Carolina Public Service Company has entered upon the

property of petitioner adjacent to its sub-station at Greensboro and is undertaking to install upon said property three large electrical transformers of the capacity of two hundred fifty (250) K. V. A. each.

VII.

That so long as petitioner is required to permit the North Carolina Public Service Company to maintain a connection between its lines and those of petitioner at Greensboro and High Point, North Carolina, it is unable to regulate, control or restrict the amounts of electricity taken by said North Carolina Public Service Company from the system of petitioner at said points or to control or restrict said North Carolina Public Service Company as to the territory in which it may resell and distribute said electricity. That the only way in which petitioner can protect itself and keep said North Carolina Public Service Company from unlawfully taking its electricity for resale and distribution is to shut off altogether the supply of electricity to said North Carolina Public Service Company at Greensboro and High Point and, as petitioner is advised and believes, it cannot do this without violating the terms of the decree of the District Court, as extended by the order of the Circuit Court of Appeals, requiring petitioner to continue to sell and deliver to the North Carolina Public Service Company electricity for resale and distribution in Greensboro and High Point, as petitioner was selling and delivering the same at and prior to the entry of the decree of the District Court.

VIII.

That the action of the North Carolina Public Service Company in extending its lines in and around Greensboro and High Point and in increasing the amounts of electricity which it is taking from petitioner's system at said places is not only, as petitioner is advised and believes, a violation by said North Carolina Public Service Company of the terms and provisions of the decree of the District Court, as extended by the Circuit Court of Appeals, but constitutes a serious and ever present menace to petitioner's stations at each of these places through which it supplies electricity. The increased amounts of electricity taken by said North Carolina Public Service Company have already overloaded petitioner's transformers at Greensboro and High Point and it is inevitable that, if such overloading continues, said transformers will be destroyed, with the result that at High Point petitioner will be left unable to supply any electricity whatsoever, either to its own customers with whom it has outstanding contracts for service, or to the North Carolina Public Service Company, while at Greensboro petitioner's service to its own customers will be very seriously impaired and it will be unable to supply any power whatsoever to the North Carolina Public Service Company. That in the event of damage to or destruction of such transformers, it will require several months to repair or replace them and will involve loss and damage to petitioner's tangible property amounting to many thousands of dollars, and will result in interruption of petitioner's business and damage to its reputation for

efficient and dependable service to the further serious irreparable loss and damage to petitioner, which loss and damage will be well nigh, if not altogether, impossible to estimate in dollars and cents.

IX.

That petitioner has made demand upon said North Carolina Public Service Company that it restrict its takings of electricity from petitioner's system at Greensboro and High Point, respectively, so that such takings will not exceed the amounts which said North Carolina Public Service Company was taking at and prior to the entry of the decree of the District Court on June 29, 1921, but said North Carolina Public Service Company has failed and refused to comply with said demand.

WHEREFORE your petitioner respectfully prays this honorable court to restrain said North Carolina Public Service Company, pending the final determination of this cause, from taking from petitioner's electrical system at Greensboro and High Point, respectively, electricity in excess of the amounts which said North Carolina Public Service Company was and had been taking at and prior to the entry of the decree of the District Court in this cause on the twenty-ninth day of June, 1921, and from extending its lines and taking on other and additional customers to be served by it with electricity taken from petitioner's already overloaded system.

This fourteenth day of June, A. D., 1923.

SOUTHERN POWER COMPANY,

By W. P. BYNUM,
R. V. LINDABURY,
E. T. CANSLER,
R. C. STRUDWICK,
W. S. O. B. ROBINSON, JR.
Attorneys for Petitioner.

STATE OF NORTH CAROLINA,
COUNTY OF MECKLENBURG.

BEFORE me, the undersigned Notary Public in and for the foregoing county and state, personally came and appeared CHAS. I. BURKHOLDER, who being duly sworn, says that he is Vice-President and General Manager of the Southern Power Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief and as to such matters, he believes it to be true.

CHAS. I. BURKHOLDER.

Sworn to and subscribed before me this fourteenth day of June, A. D., 1923.

JAMES S. SEASE,
*Notary Public, Mecklenburg
County, N. C.*

My commission expires June 17, 1923.

EXHIBIT 1

STATEMENT OF K. W. HRS. OF POWER
TAKEN FROM SOUTHERN POWER COM-
PANY BY NORTH CAROLINA PUBLIC
SERVICE COMPANY AT HIGH
POINT, N. C.

	1920	1921	1922
July	571,000	701,700	831,900
Aug.	612,500	644,500	915,600
Sep.	597,600	697,400	863,900
Oct.	549,600	757,700	887,000
Nov.	530,300	804,500	869,000
Dec.	505,000	757,800	860,600
	1921	1922	1923
Jan.	525,100	863,800	1,021,000
Feb.	515,800	760,700	927,524
Mch.	574,200	810,000	1,029,000
Apr.	508,000	704,000	913,700
May	514,000	773,900	1,005,400
June	535,500	784,200
Totals	6,538,600	9,060,200	10,124,624

EXHIBIT 2

STATEMENT OF K. W. HRS. OF POWER
 TAKEN FROM SOUTHERN POWER COM-
 PANY BY NORTH CAROLINA PUB-
 LIC SERVICE COMPANY, AT
 GREENSBORO, N. C.

	1920	1921	1922
July	604,500	812,500	885,800
August	646,900	643,100	909,000
Sept.	748,000	850,600	1,145,200
October	821,100	882,500	1,116,900
November	790,100	894,500	1,112,700
December	863,300	897,800	1,071,700
	1921	1922	1923
January	855,400	959,100	1,157,600
Feb.	744,600	836,600	1,021,700
March	733,500	845,700	1,089,500
April	705,700	783,500	1,003,400
May	642,000	775,900	962,200
June	599,100	887,800
Totals	8,754,200	10,069,600	11,475,700

U.S. SUPREME COURT, D.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 110

SOUTHERN POWER COMPANY, Petitioner

**NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, and CITY OF HIGH
POINT, Respondents.**

NOTICE OF MOTION AND PETITION TO MAINTAIN THE STATUS QUO PENDING THE DETERMINATION OF THE SUIT IN THIS COURT, AND BRIEF IN SUPPORT THEREOF.

**W. P. BYNUM,
R. V. LINDAFURY,
E. T. CANSLER,
W. S. O'B. ROBINSON, Jr.,**
*Attorneys for Petitioner, the
Southern Power Company.*

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY, Petitioner

v.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO, AND CITY OF
HIGH POINT, Respondents

NOTICE.

TO THE NORTH CAROLINA PUBLIC SERVICE COMPANY AND TO
A. L. BROOKS, ITS ATTORNEY; TO THE CITY OF GREENSBORO
AND TO CHARLES A. HINES, ITS ATTORNEY; AND TO THE
CITY OF HIGH POINT AND TO DRED PEACOCK, ITS ATTOR-
NEY:—

This is to notify you that the petitioner will on Monday, the
22nd day of October, 1923, present to the Supreme Court of
the United States in its court room in Washington, D. C., its
motion for an order maintaining the *status quo* in this suit
pending the final determination thereof by that Court by
restraining the North Carolina Public Service Company pend-
ing the final determination from increasing the amounts of
electricity to be taken by the said Company from the petition-
er's hydro-electric. system at Greensboro and High Point,
N. C., for the purpose of resale and distribution in excess of

the amounts which the said North Carolina Public Service Company was taking at the said points on and prior to the entry of the decree of the District Court herein on the 29th day of June, A. D. 1921, and a copy of the said motion and of the said petition and of the brief accompanying the same are herewith delivered to you, this the 1st-----day of

October-----1923.

SOUTHERN POWER COMPANY,
By

W. P. BYNUM,

R. V. LINDABURY,

E. T. CANSLER,

W. S. O'B. ROBINSON, JR.

Its Attorneys.

Receipt is acknowledged of the foregoing notice, and of
the motion, petition and brief in support of same. This
the 1st day of October 1923.

Attorney for the North Carolina Public Service Company.

Attorney for the City of Greensboro.

Attorney for the City of High Point.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY, Petitioner,

v.

NORTH CAROLINA PUBLIC SERVICE COMPANY,
CITY OF GREENSBORO AND CITY OF
HIGH POINT, Respondents.

BRIEF IN SUPPORT OF MOTION AND PETITION TO MAINTAIN
THE STATUS QUO PENDING DETERMINATION OF THE SUIT
IN THIS COURT.

I.

FACTS OF THE CASE

The facts of this case are set forth in the petition for certiorari heretofore filed and granted. A summary of the facts sufficient to show the violation, both present and threatened, of the decrees of the District Court and of the Circuit Court of Appeals, by the respondent Public Service Company, the resulting injury to the petitioner and destruction of the *status quo* pending the determination of the suit on the merits, and the necessity for the application made to the Court in this motion, are to be found in the printed motion and petition herewith filed.

II.

THE LAW OF THE CASE

The law of the case bearing upon the matters to be argued

upon the merits in this court we understand to be as shown in the authorities cited by petitioner in its petition for the writ of certiorari, heretofore granted by this court, and in petitioner's brief in support of said petition for certiorari, filed herewith.

III.

ARGUMENT UPON THIS MOTION

1. *The purpose and the effect of the decree below were to maintain the status quo as of the time of the entry of the decree of the District Court.*

The portions of the decree of the District Court quoted on pages 4 and 5 of the printed motion and petition show that the court only required petitioner to "continue to sell and deliver to the North Carolina Public Service Company electricity for the use and benefit of said cities of Greensboro and High Point and their citizens and inhabitants and those in the vicinities of said cities as *they are now being served by said complainant, as the defendant (petitioner) has heretofore sold and delivered such electricity to said North Carolina Public Service Company.*"

The purpose and the effect of this provision were plainly to continue the then *status quo* for the period of six months in order, as the court expressly declared, that the two cities and the Public Service Company might be afforded opportunity to make such arrangements as that they should not be left without electricity as the result of the holding by that court that petitioner could not be compelled to furnish electricity to the respondent Public Service Company to be re-sold by it as an independent vendor. This provision temporarily maintaining the *status quo* was incorporated in the decree altogether in the interest of the respondents.

While the cause was pending before the Circuit Court of Appeals, that court entered its order that the six months period during which petitioner should continue to sell and deliver electricity to the North Carolina Public Service Company for re-sale and distribution should be continued *until the further order of the court, subject to the terms and provisions set forth in the decree of the District Court.* (See record, page 331, page 5 printed motion.) No further order providing for the continued sale and delivery of electricity by petitioner to respondent Public Service Company, pending the final determination of this cause in this court, has been made, either by the District Court or by the Circuit Court of Appeals or by this court.

It results that the decrees of both courts below have been strictly limited to directing petitioner to continue to serve the Public Service Company and the two cities "as they are now being served by the said complainant, as the defendant (petitioner) has heretofore sold and delivered such electricity to said North Carolina Public Service Company." In other words the petitioner is directed, pending the determination of this cause, and purely in the interests of the respondents, to maintain the *status quo* existing as of the time of the rendition of the decree of the District Court. This direction by the courts has been obeyed by petitioner and has been deliberately violated by respondent Public Service Company.

The question presented by this motion is whether this court will allow the respondent in whose favor that status was established by the lower courts' decree, deliberately to destroy it to the irreparable damage of petitioner.

2. *Respondent Public Service Company has violated the terms of the decrees below and unless restrained will continue in such violation, destroying the status quo in its own interest and to the irreparable injury of petitioner.*

Petitioner has undertaken and has at all times been ready, able and willing to do what the courts below have ordered it to do, to-wit, continue pending the final determination of the suit, to furnish electricity to respondent in amounts in which it was furnishing it at the time of the decree of the District Court.

But, as shown in the petition, there exists the peculiar technical fact that petitioner cannot control or regulate the amount of electricity taken from it by respondent Public Service Company. Since petitioner is directed by the decrees of the courts to maintain connection with that respondent, it is within the power of that respondent to take from petitioner any amount of electricity it may choose to take. Petitioner can do nothing but violate the courts' decrees by absolutely shutting off the power, or leave respondent Public Service Company, in the absence of restraint by the court, free to take from it an unlimited amount of electrical power.

The respondent Public Service Company, taking advantage of this technical fact, has refused to be satisfied with that which the courts' decrees have guaranteed to it, the same service, the same amount of power that it was getting when the decree of the District Court was entered.

It has itself increased the amount of power taken by it from petitioner at High Point from the annual amount furnished it during the twelve months immediately preceding the District Court's decree of 6,538,600 K. W. hours to 9,060,200 K. W.

hours in a like period in 1921 and 1922 and to 10,124,624 K. W. hours in a like period in 1922 and 1923, and it has increased the amount taken at Greensboro from 8,754,200 K. W. hours in the twelve months immediately preceding the District Court's decree to 10,069,600 K. W. hours in a like period in 1921 and 1922 and to 11,475,700 K. W. hours in a like period in 1922 and 1923.

Respondent Public Service Company has already destroyed, by its own deliberate acts, the *status quo* which the courts below directed be continued by petitioner for respondents' benefit. The facts shown in the printed petition, respondent's construction of new lines to Jamestown, its extension of its industrial service at Greensboro, and the installation by it of three large transformers adjacent to petitioner's sub-station, show conclusively the intention of respondent progressively to increase the amounts of electricity it takes from petitioner and to alter the *status quo* more and more seriously in its own interest and to the prejudice of petitioner. The facts set forth in the petition show that if this continues it will be an irreparable injury to petitioner, effected by deliberate disregard of the decrees of the courts below on the part of respondent.

In addition, the facts set forth in the petition show that the taking by respondent Public Service Company of large amounts of electrical power in excess of the amount it is entitled to under the courts' decrees imminently endangers the petitioner's costly and valuable transformers and threatens to destroy them to the very great damage of petitioner and to the disruption of its service to the public.

The only means of protection possible to petitioner would be to cut off all power from respondent Public Service Company,

and this it cannot do without violating the courts' decrees. Petitioner is, therefore, wholly without remedy save at the hands of the court and unless the court grant to it the relief prayed in its motion.

3. *This application is in accordance with authority and precedent and this court has the power to maintain the status quo pending the determination of the suit, by restraining the respondent as prayed.*

We submit that this application is in accordance with the following statutory authority and precedents:

Rev. Statutes, section 716;

Ex Parte Milwaukee R. Co., 5 Wall. 188;

Omaha and Council Bluffs Street R. Co. v. Interstate Commerce Commission, 222 U. S. 582, 56 L. Ed. 324;

In re McKenzie, 180 U. S. 536, 549;

Cumberland Telephone & Telegraph Co. v. La. Public Service Commission (decided Nov. 22, 1922).

We further submit that the principles of equity, the statutory authority granted this court in Revised Statutes, section 716, and the authority of the cases above cited as precedents, should lead the court to preserve *pendente lite* the rights of the petitioner which otherwise will be irreparably destroyed, by entering its order restraining respondent Public Service Company in accordance with the prayer of your petitioner's motion.

This 25th day of September A. D. 1923.

W. P. BYNUM,

R. V. LINDABURY,

E. T. CANSLER,

W. S. O'B. ROBINSON, JR.

Attorneys for Petitioner, the Southern Power Company.